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Nos. ~~445 and 484~~

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In the
Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~445~~ 15

ILLINOIS CENTRAL RAILROAD COMPANY, ET AL.
Appellants

vs.

NORFOLK AND WESTERN RAILWAY COMPANY, ET AL.
Appellees

No. ~~484~~ 17

CALUMET HARBOR TERMINALS, INC. AND NORTH PIER TERMINAL COMPANY,
Appellants

vs.

NORFOLK AND WESTERN RAILWAY COMPANY, ET AL.
Appellees

On Appeals From The United States District Court For The Northern District Of Ohio.

APPELLANTS' BRIEF IN OPPOSITION TO THE MOTION TO AFFIRM FILED BY APPELLEES, CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY AND PULLMAN RAILROAD COMPANY

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No. 445

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STATEMENT.

Appellees, Chicago, Rock Island and Pacific Railroad Company and Pullman Railroad Company (hereinafter collectively termed "Rock Island") here assert by their motion to affirm that appellants have not submitted a substantial

question for the decision of this Court and that the decree of the lower Court should be affirmed. Appellants submit that the questions presented in their jurisdictional statement, pages 3-4, do present substantial questions for review by this Court.

Rock Island's Statement in general outlines the various stages of proceedings before the Interstate Commerce Commission. Certain matters there asserted should be clarified. Rock Island states on page 3 that railroad service has been entirely satisfactory to the shipping public and that this evidence is undisputed. The Commission, however, found (J. S. App. C, 64a):

> "No complaints of sufficient magnitude to be emphasized in the record have been made of Rock Island service to the industries at the port. This is particularly so since the filing of the applications when superior service with ample engines and crews was instituted and has been continued."

And more important, the Commission made the following finding insofar as the future was concerned (J. S. App. C, 104a-105a):

> "The time has come when additional rail service at the port is required for the future development of the industries now or hereafter to be located there. Better service to shippers and receivers of freight through the elimination of delays, by providing single-line hauls, or more direct hauls, is clearly in the public interest. It would be a detriment and hindrance to the full and complete development of Lake Calumet Harbor if it were limited to the service of a single trunkline railroad when so many adjacent railroads are available and anxious to serve the port. Although the port is now served by approximately 100 common-carrier trucklines, and there is no restriction on the number of barges and ships permitted to serve the

port, the Rock Island is the only railroad presently serving the port."

The Statement also conveys the impression that only rail-water traffic is involved in service to and from the port. True, lake service is only possible 7 to 8 months of the year (J. S. App. C, 87a). But domestic traffic, other than rail-water traffic is in need of additional rail service (J. S. App. C, 59a, 67a, and 85a).

Rock Island in its Statement, pages 4-6, describes the various applications filed by appellants. Rock Island does not state that the Commission found that, with the exception of a revision ordered by the Commission, the principal provisions of the lease covered by the second application are identical to the lease covered by the first application. The Commission further found that Rock Island had unlimited opportunity to cross-examine with reference to the provisions of the lease and also avail itself of a petition for reconsideration of the Commission's order which directed the modifications (J. S. App. D, 124a-125a). Rock Island does not state that the Commission made the following findings with respect to the lease covered by the third application of appellants (J. S. App. E, 131a-132a):

> "In our report of September 19, 1960, we held that a hearing was not necessary for a determination of the questions at issue. We also denied a request of the Rock Island for further hearing by our order of August 23, 1962. Since the general public convenience and necessity for the applicants' operations over the Port District's tracks has been determined with only the specific terms and conditions of such operations remaining for approval, and since most of the interveners' objections to the modified agreement are actually only reiterations of their objections to the overall proposals of the applicants to serve the har-

bor area which have been previously discussed and disposed of in our prior reports and orders herein, we do not deem it proper to revisit upon the applicants and other parties to the proceeding the additional time and expense of a hearing upon the modified agreement."

Despite these findings, Rock Island asserts that this action of the Commission in denying still further hearings was in error.

ARGUMENT.

Further judicial review by this Court is necessary to determine the substantial questions raised by the action of the Court below in its conclusions that the decision of the Commission was not supported by the record and that Rock Island had been denied due process of law.

I.

Rock Island admits that a reviewing court cannot substitute its view for the Commission's if the Commission's order has support in the record and the applicable law. Rock Island in some manner believes that *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474 supports its portion. Unlike *Universal Camera,* the Commission here did not differ in its conclusions from those of the Examiner who heard the case (J. S. App. C, 54a). The Court in *Universal Camera* strictly limited the power of courts of review as shown by the following, 340 U.S. 474, 490-491):

> "Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied."

Rock Island has made no such showing. It should be pointed out also that the Court below found that there was substantial support in the record for important findings which it specifically sets forth in its opinion (J. S. App. A, 7a-9a). The Court below thereafter concluded

without explanation that the Commission did not have support in the record for its findings of fact and conclusions of law (J. S. App. A, 13a). This action of the Court below does not fall within any principles of *Universal Camera.*

II.

Rock Island states that, if appellants are permitted to serve the Port under the terms of the lease finally approved, Rock Island will be forced to operate under the terms of the lease. Such is not the case. The Commission found that "the modified agreement will permit the Port District to make separate and distinct agreements with other railroads for the use of the tracks and facilities which it owns." The Commission found that "such subsequent agreements are to be reasonably comparable to the modified agreement" (J. S. App. E, p. 136a). All of such agreements, however, will require Commission approval (J. S. App. E, 137a). Rock Island certainly is not now bound to eternity by the lease agreement approved by the Commission for appellants.

Rock Island then claims lack of due process because the Commission found that the terms of the lease agreement "should be more favorable" than those of the lease which had been approved previously. Much emphasis is placed upon the use of the verb "should" and it is labeled as being "mere conjecture" upon the part of the Commission. "Should" is defined as follows in Black's Law Dictionary (Fourth Edition), p. 1549:

> "Should. The past tense of shall, St. Louis & S. F. R. Co. v. Brown, 45 Okl. 143, 144 P. 1075, 1080, ordinarily implying duty or obligation; Scarborough v. Walton, 36 Ga. App. 428, 136 S.E. 830. Kippenbrock v. Wabash R. Co., 270 Mo. 479, 194 S.W. 50, 51; although usually no more than an obligation of pro-

priety or expediency, or a moral obligation, thereby distinguished it from 'ought,' U.S. v. Stickrath, D.C. Ohio, 242 F. 151, 153. It is not normally synonymous with 'may,' Williams v. Mt. Vernon Car Mfg. Co., 197 Ill. App. 271, 272; Elliott v. Maves, 196 Ill. App. 605, 606; and although often interchangeable with the word 'would,' Barnett v. Savannah Electric Co., 15 Ga. App. 270, 82 S.E. 910, 911, it does not ordinarily express certainty as 'will' sometimes does. Hubbard v. Turner Department Store Co., 220 Mo. App. 95, 278 S.W. 1060, 1061."

No play on hidden meanings of "should" can be derived from this definition so that the Commission's use of the verb can be called "mere conjecture."

Finally, Rock Island states that it did not ask rehearing, reconsideration, reargument or "further hearing" but that it sought only an initial "hearing." As the Commission points out, it rests within the discretion of the Commission as to whether a formal hearng shall be granted. See *Woodruff* v. *United States,* 40 F. Supp. 949, (J. S. App. D, 119a-120a). The Commission further pointed out that the contentions raised by Rock Island were fully discussed in its initial report (J. S. App. D, 121a, App. E, 131a-132a).

CONCLUSION.

Appellants submit that for the reasons here stated, the motion of Rock Island to affirm the order of the District Court should be denied.

Respectfully submitted,

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